In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1599

WILMA KIRTLEY, PETITIONER

v.

CLYDE L. BICKERSTAFF, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

JOSEPHINE SCOTT, PETITIONER

v.

WILLIAM H. THOMPKINS, ACTING DISTRICT DIRECTOR OF INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners each brought suit in the United States District Court for the Western District of Oklahoma to enjoin the assessment or collection of taxes by the Internal Revenue Service. Each claimed that she qualified for relief from tax liability under Section 6013(e) of the Internal Revenue Code of 1954, which provides under certain circumstances for relief from the tax liability of persons who have filed a joint income tax return with their spouses in ignorance of unreported income. The district court dismissed their suits and the court of appeals affirmed (Pet. App. A i-v).

During 1961-1965, petitioner Kirtley was married to Buford S. Kirtley. She and her husband filed joint income tax returns upon which the Commissioner determined that embezzlement income received by Buford Kirtley was not reported. After petitioner Kirtley's failure to file a petition in the Tax Court, the Internal Revenue Service assessed taxes upon the embezzlement income against petitioner (R. 1-3).[1]

Petitioner Scott was married to Vernon Dale Scott during 1966-1968. The Commissioner determined that Vernon Scott had received income during 1966 which was not reported in the joint income tax return for 1966 filed with petitioner Scott, his then wife. Accordingly, the Commissioner assessed the taxes against her (R. 14).

The decision below correctly adheres to the command of the Anti-Injunction Act (26 U.S.C. 7421(a)) prohibiting suits enjoining "the assessment and collection of any tax * * *." Petitioners' sole argument (Pet. 13) is that they are entitled to a hearing at which their claims for relief under Section 6013(e) can be heard. But after payment of the assessments at issue, petitioners can commence refund suits in either a district court or in the Court of Claims where they would be afforded a complete evidentiary hearing on the merits of their claims.[2] Because of the Anti-Injunction Act, however, the substance of their complaint under Section 6013(e) cannot be considered

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[1]"R." references are to the record in the court of appeals.

[2]In each case, the time for filing a petition in the Tax Court had expired. See Section 6213(a) of the Code.

in an injunctive action. Since petitioners did not show (1) that under no circumstances would the government prevail on the merits, and (2) that they have no other adequate remedy at law, the courts below correctly dismissed their suit as barred by the Anti-Injunction Act. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1; *Bob Jones University* v. *Simon*, No. 72-1470, and *Commissioner* v. "*Americans United*" *Inc.*, No. 72-1371, both decided May 15, 1974.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.